

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
Civil Division
KAREN L. LOEFFLER
United States Attorney
District of Alaska
MARCIA BERMAN
Assistant Branch Director
Federal Programs Branch
STUART J. ROBINSON
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Phone: (202) 514-9239; Fax: (202) 616-8460
Email: stuart.j.robinson@usdoj.gov
RICHARD L. POMEROY
Assistant United States Attorney
Federal Building & U.S. Courthouse
222 West Seventh Ave., #9
Anchorage, AK 99513
Phone: (907) 271-5071

*Attorneys for Defendants
Environmental Protection Agency and
Administrator Gina McCarthy*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

PEBBLE LIMITED PARTNERSHIP,

Plaintiff,

v.

ENVIRONMENTAL PROTECTION
AGENCY and GINA MCCARTHY,

Defendants.

Case No. 3:14-cv-00171-HRH

STATEMENT OF POSITION

STATEMENT OF POSITION

Defendants the Environmental Protection Agency (“EPA”) and Administrator Gina McCarthy respectfully submit this Statement of Position in response to Plaintiff Pebble Limited Partnership’s Motion For Subpoena Under 28 U.S.C. § 1783, Dkt. No. 149 (“Motion”). Defendants wish to clarify that they take no position *only* as to the relief sought by Plaintiff in its Motion, that is, the requested issuance of a subpoena to former EPA employee Phil North. Upon reviewing Plaintiff’s Motion, however, Defendants find it necessary to submit this brief Statement of Position to clarify the record before the Court and dispute the unsubstantiated and inflammatory assertions made by Plaintiff in that Motion. Plaintiff’s Motion continues its practice, as Defendants have noted in prior filings, of making unsupported and irrelevant allegations.¹ *See, e.g.*, Dkt. No. 70 at 29-34; Dkt. No. 97 at 4, 31-35.

Defendants in particular object to Plaintiff’s contention that Mr. North is “uniquely situated to provide critical information.” *See* Motion at 3-7. This claim apparently is based on the allegations set out in Plaintiff’s Second Amended Complaint, *see id.*, but “allegations are not evidence.” *CopyTele, Inc. v. AU Optronics Corp.*, No. C-13-0380 EMC, 2013 WL 3458162, at *2 (N.D. Cal. July 9, 2013). Further, where Plaintiff states in its Motion that a particular exhibit ostensibly supports this claim, Defendants respectfully refer the Court to the cited exhibit for a complete and accurate statement of its contents.

Plaintiff similarly provides no factual support for its contentions that “North’s conduct thus far demonstrates that he will not submit voluntarily to discovery in this action unless compelled by this Court,” *see* Motion at 6; that Mr. North has demonstrated a “history of evasiveness,” *see id.* at 2;

¹ In its ruling on Defendants’ motion to dismiss, the Court did not reach the question of whether Plaintiff’s exhibits supported the allegations contained in the Amended Complaint. *See* Dkt. No. 128 at 11 n.20.

or that Mr. North “shut down his personal email account and fled the country” in order to avoid complying with a congressional subpoena, *see id.* at 2, 6. Indeed, Defendants are unaware of Congress ever issuing a subpoena to Mr. North.

Finally, Plaintiff’s statement that EPA “has proved to be a poor substitute source of information,” *see id.* at 6, is belied by the record in the related Freedom of Information Act (“FOIA”) case. EPA’s efforts have included providing the hard drive at issue to the Office of the Inspector General, and emails recovered from the drive have been produced to Plaintiff through FOIA. EPA has also requested through Mr. North’s counsel that Mr. North provide EPA with any thumb drive passwords he may have used and copies of any emails sent to or from his personal email account(s) concerning EPA government business. Defendants respectfully refer the Court to the record in the FOIA case for a full discussion of EPA’s extraordinary efforts to locate and produce to Plaintiff documents responsive to its request. *See Pebble Ltd. P’ship v. EPA*, Case No. 3:14-cv-0199-HRH (D. Alaska), Dkt Nos. 35, 36, 42, 43, 51.

August 21, 2015

Respectfully submitted,

KAREN L. LOEFFLER
United States Attorney
District of Alaska

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
Civil Division

RICHARD L. POMEROY
Assistant United States Attorney
District of Alaska

MARCIA BERMAN
Assistant Branch Director
Federal Programs Branch

/s/ Stuart J. Robinson
BRAD P. ROSENBERG
(DC Bar No. 467513)
ROBIN F. THURSTON
(Illinois Bar No. 6293950)
STUART J. ROBINSON
(California Bar No. 267183)
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch

Phone: (202) 514-3374 (Rosenberg)
Phone: (202) 616-8188 (Thurston)
Phone: (202) 514-9239 (Robinson)
Fax: (202) 616-8460
Email: brad.rosenberg@usdoj.gov
Email: robin.f.thurston@usdoj.gov
Email: stuart.j.robinson@usdoj.gov

Courier Address:
20 Massachusetts Ave., N.W.
Washington, DC 20530

Mailing Address:
P.O. Box 883
Washington, DC 20044

*Attorneys for Defendants
Environmental Protection Agency and
Administrator Gina McCarthy*

CERTIFICATE OF SERVICE

I certify that on August 21, 2015, I caused to be filed electronically the foregoing **STATEMENT OF POSITION** with the Clerk of Court using the Court's CM/ECF system, which sends a Notice of Electronic Filing to counsel of record.

/s/ Stuart J. Robinson
STUART J. ROBINSON